APPENDIX

Judgment of Court of Appeals for the Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-four day of May one thousand nine hundred and sixty-six.

Present:

HON. STERRY R. WATERMAN,
HON. IRVING R. KAUFMAN,
HON. ROBERT P. ANDERSON,

Circuit Judges.

BEYS AFROYIM,

Plaintiff-Appellant,

—v.—

DEAN RUSK, as Secretary of State,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the

Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.

Opinion of Court of Appeals for the Second Circuit

Before: WATERMAN, KAUFMAN and ANDERSON, *Circuit Judges.*

WATERMAN, *Circuit Judge:*

Plaintiff commenced a declaratory judgment action in the United States District Court for the Southern District of New York challenging the constitutionality of 8 U. S. C. §1481(a)(5). He alleged that the section is both unconstitutional on its face and as applied to him in that it violates the due process guarantee of the Fifth Amendment and violates Section 1, Clause 1 of the Fourteenth Amendment.

After cross-motions for summary judgment had been filed by both parties, the court below in a reasoned opinion, reported at 250 F. Supp. 686 (S. D. N. Y. 1966), granted the motion filed by the defendant Secretary of State and dismissed plaintiff's complaint on the ground that there was no genuine issue as to any material fact and that the Secretary was entitled to judgment as a matter of law.

Plaintiff, who had been a naturalized citizen of the United States, had suffered the loss of that citizenship on November 14, 1960, on the ground that he had expatriated himself on July 30, 1951, when he had voluntarily voted in an Israeli parliamentary election.[1]

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[1] Section 401 of the Nationality Act of 1940, 54 Stat. 1137, as amended by the Act of September 27, 1944, 58 Stat. 746; 8 U. S. C. (1946 ed.) §801 provides:

> §801. General means of losing United States nationality.
>
> A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> * * * * *

(Footnote continued on next page)

The court below handed down its order upon a stipulation of the parties which set forth the material facts:

"1. Plaintiff, who was born in Poland in 1893, emigrated to the United States in 1912. Plaintiff under the name of Ephraim Bernstein, also known as Beys Afroyim, became a naturalized citizen by order of this Court on June 14, 1926.

"2. On July 30, 1951 plaintiff voted in the elections for the second Knesset, the Parliament of the State of Israel.

"3. The election for the second Knesset was a political election in a foreign state within the contemplation of Section 401(e) of the Nationality Act of 1940.

"4. Plaintiff voluntarily voted in the said election.

"5. Plaintiff contends that neither at the time of the election nor at any other time did he have any intention or desire to lose or abandon his American citizenship. Plaintiff also contends that he considered himself at all times an American citizen with allegiance to the United States. Defendant will not stipulate with respect to the truthfulness of these allegations. Defendant also maintains that these allegations are irrelevant since a specific intent or desire to lose or abandon American citizenship is not a requisite for expatriation under Section 401(e) of the Nationality Act of 1940.

(e) Voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory.

This provision of the Nationality Act of 1940 was preserved in the Immigration and Naturalization Act of 1952, Ch. 477, Title III, ch. 3, Section 349(a)(5), 66 Stat. 267; 8 U. S. C. §1481(a)(5).

"6. On November 14, 1960 the American Vice Consul at Haifa, Israel, issued a Certificate of Loss of Nationality to plaintiff on the ground that he expatriated himself on July 30, 1951 under Section 401(e) of the Nationality Act of 1940 by voting in a political election in a foreign state. The Vice Consul's action was approved by the Passport Office of the Department of State on January 4, 1961. Plaintiff on January 27, 1965 appealed to the State Department's Board of Review on the Loss of Nationality, and on May 3, 1965 the Board affirmed the Vice Consul's determination."

In his brief upon appeal appellant claims the statute violates the First, Sixth, and Eighth Amendments as well as the Fifth and Fourteenth; the First because Congress has sought by the Act to impose a drastic sanction upon a citizen's freedom to express his opinion on political, social or economic issues, and the Sixth and Eighth because the statute appears to have a punitive ring to it and the safeguards guaranteed by the Sixth to one charged with crime are not made available to one who may suffer, as did this appellant, a claimed "unusual punishment" barred by the Eighth.

We are of course bound by the authority of *Perez* v. *Brownell*, 356 U. S. 44 (1958) wherein a native-born American citizen who voted in a Mexican political election, and who had lost his citizenship thereby, sought to have the U. S. Supreme Court hold that the predecessor statutory provision here challenged was beyond the power of Congress to enact—and wherein the constitutionality of the legislation was upheld.

Appellant contends that subsequent decisions of the Court have so devitalized *Perez* that its holding is no longer a

binding precedent. Our attention is directed as evidence of this claimed devitalization to the case of *Kennedy* v. *Mendoza-Martinez,* 372 U. S. 144 (1963), which held, as to the citizens involved, 8 U. S. C. §1481(a)(10), a different provision of 8 U. S. C. §1481(a) from the one before us here, unconstitutional. However, the result reached in *Perez* was not affected by *Mendoza-Martinez,* see the opinion for the Court, 372 U. S. 144, at 162-163, the reservations of concurring Justices, pp. 186, 187, and the statement for the dissenting Justices, pp. 202, 203.

Also, we are asked to consider the result the Court reached in *Schneider* v. *Rusk,* 377 U. S. 163 (1964) as also indicative of a weakening of the *Perez* authority. However, at 166-167 of the Court's opinion, written by a *Perez* dissenter, there is a careful explanation of the specific ground upon which *Schneider* was distinguished from *Perez.*

We are even urged to disregard *Perez* because of the holding in a case contemporaneously decided, *Trop* v. *Dulles,* 356 U. S. 86 (1958). In *Trop,* on the facts there, the Court held that 8 U. S. C. §401(g), now 8 U. S. C. §1481(a)(8), again a different provision from 8 U. S. C. §1481(a)(5), was as to *Trop* an unconstitutional enactment while at the same time holding 8 U. S. C. §401(e) constitutional. The thrust of this argument is that the Court in *Perez* did not appear to consider that a denaturalization might be a punishment though the Court had that in mind in *Trop,* decided the same day.

Subsequent to all of the Supreme Court cases cited to us and set forth *supra,* we have, within the year, recognized in *Tanaka* v. *INS,* 346 F. 2d 438 (2 Cir. 1965), the binding authority of *Perez.* We said there:

> "It is not open to question that the voluntary act of voting in a foreign election in 1950 results in expatriation under §401(e) of the Nationality Act of 1940, the constitutionality of this provision having been expressly affirmed in Perez v. Brownell, 356 U. S. 44, 78 S. Ct. 568, 2 L. Ed. 2d 603 (1958). However, no conduct results in expatriation unless *it is voluntary.* Nishikawa v. Dulles, 356 U. S. 129." (Emphasis supplied.) 346 F. 2d 438, 441.

Admittedly, as stipulated in this case, appellant's participation in the Israeli election was voluntary. Moreover, no claim is made on appeal that appellant has acquired Israeli citizenship and can therefore be claimed to have dual nationality.

We affirm the judgment below on the authority of *Perez* v. *Brownell, supra,* and *Tanaka* v. *INS, supra.*

The exposition by the court below of the present posture of the issues that were decided by the Court in *Perez* was exhaustive and most penetrating, and we adopt as the rationale for our own opinion the following language in the opinion below at 690:

> "Suffice it to say that *Perez,* read as a whole, holds that the Constitution does not deny Congress the power to prevent American citizens from engaging in the processes of political decision in a foreign state, regardless of whether our government is interested one way or another in the specific outcome of the election or interested only in maintaining an appearance of circumspect neutrality. *Perez* confirmed a Congressional power to determine that the formulation of sensitive political decisions vitally important to a foreign state—and in-

directly affecting the international community at large —should properly be conducted without the participation of American citizens."

Affirmed.

KAUFMAN, *Circuit Judge* (concurring):

I feel constrained to concur—albeit reluctantly. In *Tanaka* v. *Immigration & Naturalization Service,* 346 F. 2d 438 (2d Cir. 1965) (dissenting opinion), I expressed grave doubt as to whether the Supreme Court's opinion in *Perez* v. *Brownell,* 356 U. S. 44 (1958) retained vitality. And, I questioned there whether *Perez* was not to be limited to its facts in the face of the Court's subsequent holdings in *Kennedy* v. *Mendoza-Martinez,* 372 U. S. 144 (1963) and *Schneider* v. *Rusk,* 377 U. S. 163 (1964). I am still of the view that the Supreme Court's opinion in *Perez,* a bare majority of one ruling, should be narrowly construed and strictly confined to its facts until that Court is asked to review its interpretation of Section 401(e) of the Nationality Act of 1940,* an event which I believe is inevitable in light of the series of perplexing denationalization opinions rendered by the Supreme Court in its 1963 term. See Kurland, *The Supreme Court 1963 Term—Forward: Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government,* 78 Harv. L. Rev. 143, 169-175 (1964). And, it is not of little interest that Justice Brennan, a member of the five-to-four *Perez* majority subsequently expressed his own "doubts of the correctness of

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* This provision has been carried forward as Section 349(a)(5) of the Immigration and Naturalization Act of 1952.

Perez, which I joined." *Kennedy* v. *Mendoza-Martinez, supra* at 187.

Furthermore, the *ratio decidendi* of *Perez* is not persuasive when applied to the instant facts. I see no reason why an individual who performed the act of voting in a foreign election, after full disclosure of his American ties should be visited with such severe consequences as loss of citizenship and the deportation which will inevitably follow, without a showing that his voting somehow impeded or interfered with the conduct of this country's foreign affairs. Such interference was the "rational nexus" which Mr. Justice Frankfurter found so essential in *Perez* and which is wholly missing here.

I lean to the view that if Afroyim had not expressly stipulated the facts of his case so as to bring it squarely within the ambit of *Perez,* the result here might have been different. To illustrate, the administrative record discloses that unlike *Perez* who did not reveal his American citizenship to the Mexican authorities when he voted there, Afroyim presented his identification booklet—a document which described him as an American citizen—to the Israeli election officials. Thus, Israeli authorities, knowing of Afroyim's American citizenship, would seem to have openly ignored any objection that country might have had to a non-Israeli voting in its elections. It is fair to infer from this that any risk of embarrassment to this country's relationship with Israel by reason of the involvement of Afroyim in Israel's internal affairs was thus removed.

However, in light of the stipulation in this case and because the majority of two panels of this Court believes that *Perez* has not become moribund, I concur reluctantly, as I have already indicated, in the result reached in the majority opinion.

Opinion, Judgment, and Order of District Court

BRYAN, *District Judge:*

In this declaratory judgment action plaintiff, who has lost his American citizenship under § 401(e) of the Nationality Act of 1940, 8 U. S. C. § 1481(a)(5), challenges the constitutionality of that section.

While it does not appear whether plaintiff was within the United States when the action was commenced, there is jurisdiction in any event. If he was, this court has jurisdiction under § 360(a) of the Immigration and Nationality Act of 1952, 8 U. S. C. § 1503(a). If he was not, this court has jurisdiction under § 10 of the Administrative Procedure Act, 5 U. S. C. § 1009, as implemented by the Declaratory Judgment Act, 28 U. S. C. § 2201. See Rusk v. Cort, 369 U. S. 367 (1962).

Both parties have cross-moved for summary judgment on stipulated facts pursuant to Rule 56(a), (b), F. R. C. P.

Plaintiff was born in Poland in 1893, and emigrated to the United States in 1912. He became a naturalized citizen in this court on June 14, 1926.

Some time during 1950 the plaintiff emigrated to Israel. He resided there some ten years, pursuing his profession as an artist. By his residence in Israel plaintiff apparently has acquired Israeli citizenship, though the parties have not argued the question here. There has been no claim by the plaintiff that the deprivation of his American citizenship will render him a stateless person.

On November 14, 1960, in preparation for a return to this country, plaintiff applied to the United States Consulate in Haifa for a passport. His application was rejected, and the American Vice Consul issued a Certificate

of Loss of Nationality to plaintiff on the ground that he had expatriated himself on July 30, 1951, by casting a ballot in a political election in a foreign state in contravention of § 401(e).[1] The Vice Consul's action was approved by the Passport Office of the Department of State on January 4, 1961. Plaintiff appealed to the State Department's Board of Review on the Loss of Nationality which affirmed the Vice Consul's determination on May 3, 1965. This action followed.

Throughout the administrative proceedings plaintiff contended that he had never voted in an election of the State of Israel, but only entered the polling place to sketch the voters as they cast their ballots. Before this court, however, it is stipulated that on July 30, 1951, plaintiff voted in the elections for the Second Knesset, the Parliament of the State of Israel. And it is agreed that he did so voluntarily.[2]

Plaintiff contends that at no time did he intend to abandon his American citizenship. Defendant refuses to stipulate that this allegation is true or false, but urges that in any event it is immaterial for purposes of deciding the case at bar.

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[1] 8 U. S. C. § 1481(a)(5) reads as follows: "From and after the effective date of this chapter a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by—

* * * * *

"(5) voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory;

* * * * *."

[2] The effect of this stipulation is to remove the oft-litigated issue of duress from the case at bar. See, e.g., Tanaka v. Immigration & Naturalization Service, 346 F. 2d 438 (2 Cir. 1965); Takehara v. Dulles, 205 F. 2d 560 (9 Cir. 1953); Acheson v. Kuniyuki, 189 F. 2d 741 (9 Cir. 1951), *cert. den.*, 342 U. S. 942 (1953); Doreau v. Marshall, 170 F. 2d 721 (3 Cir. 1948).

It has been said with good reason that the "[v]iews of the Justices have varied when it comes to the problem of expatriation." Schneider v. Rusk, 377 U. S. 163, 166 (1964). Under these circumstances the task of a District Court, charged with applying the law as declared by the Supreme Court of the United States, is not without its difficulties.

The decision in Perez v. Brownell, 356 U. S. 44 (1958), is directly called into question by the plaintiff in the case at bar. There the Supreme Court by a 5-4 vote squarely upheld the constitutionality of § 401(e) as a proper incident of the power of Congress to regulate foreign affairs; the statute was applied—despite Fifth and Fourteenth Amendment objections—to a natural born American citizen who had voted in political elections in Mexico. Plaintiff candidly concedes that *Perez* would be controlling here, were it not, as he urges, that the vitality of that decision has been so completely undermined by subsequent cases that it no longer has the force of law. I am fully conversant with the speculation to the effect that the Supreme Court in recent years has *sub silentio* overruled *Perez*,[3] but in my view that case is still a precedent binding on this court.

The issue posed by Justice Frankfurter in *Perez*—and restated as the controlling question by Justice Douglas in the recent case of Schneider v. Rusk, *supra* at 166—is whether "the means, withdrawal of citizenship, [is] reasonably calculated to effect the end that is within the power of Congress to achieve, the avoidance of embarrass-

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[3] See, e.g., Tanaka v. Immigration & Naturalization Service, 346 F. 2d 438, 447-48 n. 3 (2 Cir. 1965) (Kaufman, J., dissenting); Agata, Involuntary Expatriation and Schneider v. Rusk, 27 U. Pitt. L. Rev. 1 (1965); Kurland, Foreword: Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government, 78 Harv. L. Rev. 143 (1964).

ment in the conduct of our foreign affairs." 356 U. S. at 60. In *Perez* the court answered that question in the affirmative as to § 401(e), finding that it was the "possession of American citizenship" that made the act of voting in a foreign political election "potentially embarrassing to the American government and pregnant with the possibility of embroiling this country in disputes with other nations." *Ibid.* It was therefore held that Congress could provide for termination of citizenship so as to eliminate the problem.

Perez also flatly rejected the contention that a person, voting abroad in a foreign political election, must intend to give up his citizenship before it may be taken away. Whether § 401(e) requires a purposeful abandonment of citizenship is simply a matter of statutory interpretation which is closed in this court by the *Perez* decision.[4] In any event, Justice Frankfurter's interpretation is supported by the intent and the plain meaning of the statute as well as by precedent.[5] And it is sustained by reason. Indeed, if, as *Perez* holds, it is the foreign affairs power which supports deprivation of citizenship under § 401(e), then Congress quite justifiably can attach a loss of citizenship for voting in a foreign political election without regard to the

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[4] Certainly it cannot be said that intent must necessarily be included as an element of § 401(e) in order to save its constitutionality. There is even a serious question as to whether the Constitution in any significant degree forbids *criminal* punishment for unintentional conduct. See Shevlin-Carpenter Co. v. Minnesota, 218 U. S. 57 (1910); Packer, Mens Rea and the Supreme Court, 1962 Sup. Ct. Rev. 107. Much less would it prohibit the application of § 401(e)—which is non-penal in nature, see pp. 8-9 *infra*—to an actor who was unaware of the consequences of his conduct.

[5] E.g., Savorgnan v. United States, 338 U. S. 491 (1950); Mackenzie v. Hare, 239 U. S. 299 (1915); Acheson v. Kuniyuki, 189 F. 2d 741 (9 Cir. 1951), *cert. den.* 342 U. S. 942 (1952).

voter's intent. It is the "possession of American citizenship" by the voter, not the state of his mind, which poses a hazard to the conduct of our international relations. For example, participation by Americans in the plebiscite to determine sovereignty over the Saar—activity which was the immediate catalyst for the passage of § 401(e)—did not hamper the conduct of foreign affairs any the less because some of those voting may have had no intention of abandoning their American citizenship.

Since *Perez* is direct authority against plaintiff on the question presented here, the function of this court is only to determine whether the vitality of that decision has survived. The four Justices who dissented in *Perez* joined in the opinion of the Court in Trop v. Dulles, 356 U. S. 86 (1958), which held unconstitutional a statute denationalizing any citizen who had been convicted of desertion by a court-martial. One Justice concurred on a separate ground. Four others dissented. Unconstitutionally, in the opinion of the Court, rested upon: (1) a total inability of Congress to effectuate a deprivation of citizenship except on voluntary renunciation, and (2) the cruel and unusual punishment clause of the 8th Amendment. Neither factor has significance here.

As to the first ground, the view that Congress is incapable of accomplishing involuntary expatriation has simply "not yet commanded a majority of the entire Court." Schneider v. Rusk, *supra* at 166. The second ground in *Trop*, the cruel and unusual punishment clause, is inapplicable to the case at bar because § 401(e) is non-penal in nature. Justice Frankfurter concluded in *Perez* that the statute was designed to prevent intentional or unwitting interference with the foreign relations of the United States by an

American citizen abroad. The purpose of the statute, he held, was regulation, not punishment.

It was for this reason that the mere casting of a ballot in a foreign political election—conduct on its face quite harmless or even commendable—was deemed to be sufficient to trigger the drastic and irremediable sanction of forfeiture of citizenship. Thus *Trop* cannot be said to undermine *Perez*. It is not open for plaintiff to contend here that § 401(e) is in essence a penal law passed in a spirit of vindictiveness, and must satisfy constitutional standards more stringent than those applied in *Perez*.

The holding in *Perez* that § 401(e) is non-penal in nature also distinguishes the present case from the two decisions in Kennedy v. Mendoza-Martinez, 372 U. S. 44 (1963). The Supreme Court there invalidated §§ 401(j) and 349(a)(10) of the Nationality Act of 1952 "because in them Congress [had] plainly employed the sanction of deprivation of nationality as a punishment—for the offense of leaving or remaining outside the country to evade military service—without affording the procedural safeguards guaranteed by the 5th and 6th Amendments." *Id.* at 165-66. *Perez*, however, was considered by the Court to be distinguishable because § 401(e) was supported by "legislative history totally different from that underlying §§ 401(j) and 349(a)(10)." *Id.* at 164; see *id.* at 170 n. 30. Thus the reservation in *Mendoza-Martinez*, rather than the decision, is instructive here.

In addition to contending that *Perez* has been in effect overruled by recent cases, plaintiff directly assails the reasoning of that decision. He attacks the wisdom—and even the rationale—of a statute which presumes that an American citizen by merely voting in a foreign political election could involve this country in international diffi-

culties. He challenges the conclusion in *Perez* that "the citizen may by his action unwittingly promote or encourage a course of conduct contrary to the interests of his own government," 356 U. S. at 59, because any citizen may do that simply by voting in this country for a candidate who turns out badly or by exercising his rights of free speech at home or abroad. Plaintiff seeks to discount any danger in the possibility that the "people or government of the foreign country may regard [the voter's] action" to be a "reflection if not an expression" of the policy of the United States, *ibid.*, because the same likelihood obtains whenever an American citizen abroad expresses his views on any matter of political import.

Plaintiff's attacks upon § 401(e) and upon these isolated observations in the *Perez* opinion are not wholly unpersuasive. But in the delicate field of constitutional adjudication a court is not called upon to pass on the wisdom or the efficacy of a statute; the question is only "whether or not Congress may have concluded not unreasonably that there is a relevant connection between [the] fundamental source of power and the ultimate legislative action." *Id.* at 58. *Perez* found a sufficient connection. It is not within the province of this court to overrule that conclusion. Suffice it to say that *Perez,* read as a whole, holds that the Constitution does not deny Congress the power to prevent American citizens from engaging in the processes of political decision in a foreign state, regardless of whether our government is interested one way or another in the specific outcome of the election or interested only in maintaining an appearance of circumspect neutrality. *Perez* confirmed a Congressional power to determine that the formulation of sensitive political decisions vitally important to a for-

eign state—and indirectly affecting the international community at large—should properly be conducted without the participation of American citizens.

Beyond this, Congress might well conclude that a citizen's voting abroad constituted conduct "inconsistent with undiluted allegiance to this country." Kennedy v. Mendoza-Martinez, *supra* at 214 (Stewart, J., dissenting). As was said in Acheson v. Wohlmuth, 196 F. 2d 866, 870 (D. C. Cir.) *cert. den.*, 344 U. S. 833 (1952):

> "the intent of Congress in the Nationality Act was to attach the consequence of loss of citizenship to conduct which substantially evidences allegiance to a government existing in a territory other than our own * * *. When we come to consider the meaning of Section 401(e) as a whole, it becomes apparent that Congress there sought to distinguish between acts performed in the interest of maintaining our own governmental institutions and acts which tend to support or implement institutions other than our own."

Thus, if it is now the law that Congress may effectuate a withdrawal of the precious rights of citizenship only upon conduct evincing something less than full allegiance to this country, compare Schneider v. Rusk, *supra* at 168 (Douglas, J.), with *id.* at 178 (Clark, J., dissenting), then § 401(e) satisfies that test. Indeed, the suggestion in *Perez* that in the opinion of Congress voting in a foreign political election could import "allegiance to another country" in some measure "inconsistent with American citizenship," 356 U. S. at 61, might well be the source of the doctrine which apparently gained a consensus of the Justices in *Schneider*.

In my view the authority of *Perez* v. *Brownell* still stands and is controlling here. This conclusion is in full

accord with the decisions of the Second Circuit in which the vitality of *Perez* was at least collaterally challenged. Tanaka v. Immigration & Naturalization Service, 346 F. 2d 438 (2 Cir. 1965); United States ex rel. Marks v. Esperdy, 315 F. 2d 673 (2 Cir. 1963), aff'd by an equally divided court, 377 U. S. 214 (1964). See also Rocha v. United States, 351 F. 2d 523 (1 Cir. 1965), petition for cert. filed, 34 U. S. L. Week 3272 (U. S. Jan. 10, 1966).

Defendant's motion for summary judgment is granted. Plaintiff's oral cross-motion for the same relief is denied. Judgment will be entered accordingly.

It is so ordered.